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RULE OF LAW GOES GLOBAL SYMPOSIUM

## No unalloyed good

THERESA REINOLD — 6 July, 2015



1



### The AU's rejection of "unconstitutional changes of government"

*Theresa Reinold*

Democracy and Africa are two words that rarely appear in the same sentence. If they do, the sentences are usually framed in exhortatory or aspirational terms rather than as statements of facts. Yet even though free and fair elections are still far from being the habitual way of obtaining and transferring political power in Africa, the African Union (AU) has developed an impressive array of instruments that seek to nurture a culture of democratic competition in member-states. The actual effects of these policies on democracy and the rule of law are rather ambivalent, however.

In this post I want to make several arguments. I will show that (sub)regional organizations in Africa have actually displayed a rather consistent commitment to some elements of their democracy promotion framework, for instance the rejection of coup d'états against sitting governments, and the practice of banning the perpetrators of unconstitutional changes of government from participating in subsequent elections. However, I shall also argue that the AU's insistence on conformity with constitutional procedures sometimes frustrates efforts to advance popular sovereignty. Moreover, the AU's democracy promotion efforts clearly display an incumbency bias. And finally, the common practice of brokering power-sharing agreements after contested elections neither strengthens the rule of law, nor does it contribute to fostering a culture of healthy democratic competition in Africa.

### **The concept of unconstitutional changes of government...**

When in 2013 Egypt's first democratically elected President, Mohamed Morsi, was toppled in a coup d'état after weeks of popular protests, the UN and many Western states reacted rather leniently. The AU, by contrast, swiftly suspended Egypt – one of its most powerful members – from participating in the activities of the Union, because the continental organization considered the coup to be an “unconstitutional change of government”. African efforts to give substance to the democratic entitlement include, *inter alia*, Art. 30 of the AU Constitutive Act, which declares that governments coming to power through unconstitutional means shall not be allowed to participate in the activities of the continental organization, the adoption of the African Charter on Democracy, Elections and Governance, and, most notably, the 2003 amendment of the AU Constitutive

Act. This amendment expanded the scope of Art. 4(h), authorizing the AU to intervene in member-states in the event of a “serious threat to legitimate order” – militarily if necessary.

Unconstitutional changes of government are defined in the African Democracy Charter as follows:

- A military coup d'état against a democratically elected government
- Intervention by mercenaries to replace a democratically elected government
- Replacement of a democratically elected government by armed rebel movements
- The refusal of an incumbent government to relinquish power after free and fair elections
- Amendment or revision of constitutions and legal instruments, contrary to the provisions of the constitution, to prolong the tenure of the incumbent government

Sanctions include the suspension of the member state's participation in the activities of the AU as well as the imposition of targeted sanctions. Moreover, the perpetrators of unconstitutional changes of government are not allowed to participate in elections that are held after a coup to restore constitutional order and “may be tried before the competent court” (Art. 25 of the Democracy Charter). Another innovative feature is the AU's right to intervene militarily in the event of a “serious threat to legitimate order”. According to the AU Constitutive Act no authorization from the UN Security Council is necessary, which clearly violates the prohibition on the use of force enshrined in Art. 2(4) of the UN Charter.

***... and its application in practice: Good coups, bad coups***

Now that we have a rough idea of what the norms are on paper let us have a look at how they have been implemented in practice. In Mauritania and Madagascar, for instance, the AU responded to the overthrow of incumbent governments and quickly imposed sanctions, despite the poor governance records of these regimes and despite the popular support these coups enjoyed. These examples can be contrasted with the case of Zimbabwe, where one of Africa's longest-serving dictators – Robert Mugabe – has consistently refused to give up power after elections, and yet the AU has remained extremely reluctant to enforce its norm against unconstitutional changes of government against the Mugabe regime.

The cases of Mauritania, Madagascar, Zimbabwe and also Egypt suggest that the AU has an incumbency bias, and even though there are a few counter-examples (Cote d'Ivoire is a case in point) this incumbency bias has undermined the legitimacy of the AU's democracy promotion efforts. This raises another important point, namely that democracy and the rule of law do not always go hand in hand. The problem with the AU's blanket prohibition on unconstitutional changes of government is that elections are not always free and fair in Africa, and that in the absence of a functioning system of democratic competition a coup d'état is sometimes the only way of removing a repressive regime from power. While such a move is clearly in violation of the rule of law, it may sometimes be necessary to give effect to popular sovereignty. Hence it does make sense to distinguish between good coups and bad coups.

### **Quick fixes v long-term democracy promotion**

Finally, the AU and the subregional organizations' practice of brokering power-sharing agreements after contested elections – Kenya is a case in point – is problematic both from a rule of law perspective and a democracy promotion perspective. These agreements often violate the rule of law – for instance by creating additional political offices such as a prime-minister post not foreseen in the constitution. Constitutions are thus manipulated to satisfy various political stakeholders in order to prevent or end post-election violence. In the long run, this practice undermines the legitimacy of elections, the integrity of the constitution, and basically rewards the use of violence as a means of political competition.

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6 July, 2015 at 08:14 (Edit) — Reply

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